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JAY NICHOLAS LONG

Supreme Court of the United States

October Term, 1956

No. 205

UNITED STATES OF AMERICA, ex rel., ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS,

Petitioners,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Respondent.

PETITIONERS' BRIEF ON THE MERITS

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Opinions Below

The opinion of the District Court, Dawson, U. S. D. J., dismissing the writ of habeas corpus herein has been reported in 133 Federal Supplement at page 433, and also appears at page 2 of the record herein. The opinion of the Court of Appeals, affirming same has been reported, 233 F. (2d) 705. The majority opinion of Judge Hincks and Waterman and the dissenting opinion of Judge Frank are printed in the record herein at pages 16 and 23, respectively.

Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on May 9, 1956.

2. No application for rehearing was made.

3. The Court of Appeals stayed the issuance of the mandate by order of May 28, 1956 in accordance with its Rule 28(c)(1) and (2).

4. The petition for certiorari was filed in this Court June 27, 1956 and granted October 8, 1956, 77 S. Ct. 53.

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254.

Statutes and Rules Relied On

Section 19(c) of the Immigration Act of 1917, 39 Stat. 889, as amended by the Act of June 28, 1940, 54 Stat. 671, 672; the Act of December 8, 1942, c. 697, 56 Stat. 1044; and the Act of July 1, 1948, c. 783, 62 Stat. 1206; 8 U.S.C.A. (1942 Ed.), 1951 Supp., Section 155(c) provided:

> "(c) In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation: or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed

statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating, in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. Deportation proceedings shall not be canceled in the case of an alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 212 of this title, for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: Provided, That no quota shall be reduced by more than 50 per centum in any fiscal year. As amended December 8, 1942, c. 697, 56 Stat. 1044; July 1, 1948, c. 783, 62 Stat. 1206."

Section 405(a) of the McCarran Immigration and Nationality Act of June 27, 1952, 66 Stat. 280, 8 U.S.C. 1101 note, which, insofar as relevant, provides:

> "(a) Nothing in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceeding which shall be valid at the time this Act shall take effect; or to affect any * * * proceedings, civil or criminal, brought, * * * at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * *An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.*" (Italics supplied.)

Question Presented for Review

Whether or not the Courts below erred in not holding that it was an improper exercise of discretion, or in effect a total failure to exercise its discretion under the appropriate statute, for the Board of Immigration Appeals to permit its action in a matter solely within the purview of Section 19(c)(2) of the Immigration Act of February 5, 1917, as amended, to be unduly narrowed and influenced by Congressional Committee Reports made in the course of the enactment of the subsequent Immigration and Nationality Act of June 27, 1952, and the provisions of that 1952 Act, which, in its Saving Clause, Section 405, expressly provides that said 1917 Act, as amended, shall solely apply to cases which arose prior to the effective date of said 1952 Act?

Statement of the Case

The facts appear in the minutes of immigration hearing at Ellis Island on May 29, 1952, and are contained in file of the Immigration Service which is a part of appellee's return to the writ by reference.

Petitioners are husband and wife, and both are of Greek ethnic origin and nationality. The husband was born June 30, 1913 in Trapesund, Turkey, and was taken to Greece in 1922, when nine years of age, as a Greek repatriate. The wife was born December 28, 1923 in Rostov, Russia and was taken to Greece in November, 1938, when fourteen years of age, as a Greek repatriate. Their American-born child is now five years of age and resides with them in New York.

Both were admitted lawfully to the United States as crew members on the steamship "Panagiotis Koumandaros", the female on July 4, 1951 at Newport News, Virginia, and the male on August 15, 1951 at Baltimore, Maryland, their last entries into the United States.

The male had served on vessels for at least fifteen years previously, including the dangerous war period, and on the S. S. "Panagiotis Koumandaros", on which he last arrived in the United States, for at least three years. He had made at least 30 entries into the United States as a seaman before his last entry upon which the warrants of arrest and deportation herein are predicated. He had at no time previously overstayed his leave and had always departed on the vessel on which he had arrived.

In 1950 petitioners agreed to enter into marriage with each other. However, since the vessel on which the male was employed was not scheduled for an early stop at a Greek port they arranged for the female to meet the male at Casablanca, French Morocco at a time when his ship was scheduled to be there. As a result they were married in Casablanca on December 6, 1950.

The male had been employed on the S. S. "Panagiotis Koumandaros" since 1948. Desiring his wife to be with him, he arranged for her employment thereon as an assistant steward. From the time of her said employment (December 1950) until her last entry into the United States on July 4, 1951 at Newport News, she was continuously employed on said vessel, had made at least four entries as a crew member into the United States, had always departed with the vessel, and had never overstayed her leave.

During that period of about seven months the female conceived a child. Although pregnant, she continued in her employment on the S. S. "Panagiotis Koumandaros". However, on her fifth trip to the United States she was in her sixth month of pregnancy and became seriously ill. She needed medical attention, and when the vessel arrived at Newport News in July, 1951 she decided to seek medical advice because of her distressed condition. She proceeded to New York by bus and consulted Dr. C. Paul O'Connell at the Harkness Pavilion at the Medical Center on July 23, 1951. His certificate, which is a part of the record, states "* * * that no woman at this stage of pregnancy should undertake ocean voyages, as it places them too far from adequate medical care in the event of an obstetrical emergency".

It was only because of her aggravated condition and the advice of her doctor that a return to her duties on ship would imperil both her life and that of her expected child that she decided to remain ashore until her child was born. This is confirmed by her husband's action—he did not leave the ship with his wife. To the contrary, he continued his employment and departed with the vessel in the hope that upon the next arrival of his ship in the United States his wife would be in condition to rejoin him. His next arrival was at Baltimore, Maryland on August 15, 1951 and he went ashore with the intention of reshipping. It was only after he saw his wife, learned the seriousness

of her condition, and heard her pleas that he remain with her until the birth of their child, since they had neither relatives nor friends in the United States, that he decided to remain ashore with her.

Only after their child was born on November 11, 1951 did they conceive the hope that they could remain in the United States to give their child the educational, spiritual and material benefits available to him here but not in Greece, where economic conditions have been so bad for years as to necessitate the enactment by our Congress, successively, of the Displaced Persons Act and the present Refugee Relief Act to relieve that greatly overcrowded and distressed country, and others similarly situated.

During the five years which have elapsed since their entries in the summer of 1951, they have been wholly self-supporting, have established a comfortable home for themselves and their American citizen child, have been law-abiding, and in every way have comported themselves as good members of the community in which they have lived.

On January 4, 1952, less than two months after the birth of their child, and more than five months prior to the enactment of the Immigration and Nationality Act on June 27, 1952, they voluntarily disclosed their presence in the United States and made and filed with the New York office of the Immigration Service formal applications for suspension of deportation pursuant to the provisions of Section 19(c)(2) of the Immigration Act of February 5, 1917 (8 U.S.C. 155(c)(2), which provides:

> "(c) In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien * * * if he finds (a) that

such deportation would result in serious economic detriment to a citizen or legally resident alien who is the * * * minor child of such deportable alien; * * *."

Thereafter on April 9, 1952 warrants of arrest in deportation proceedings issued against both, and on May 29, 1952 they were accorded a hearing thereunder at Ellis Island.

At the conclusion of said hearing of May 29, 1952 at Ellis Island, the Hearing Officer made a decision, R. 7, 8, in which he stated:

"Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. They have asked in the alternative for voluntary departure in lieu of deportation. Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their only income is from the employment of the male respondent on two jobs, the one as a salesman and the other as a superintendent of the apartment house in which they live. His combined income amounts to approximately $64.00 a week. Their joint assets consist of savings in the sum of about $500.00 and their furniture and other personal property which they value at $1500.00. While it would seem that their son, who was born in New York City in November 1951 would suffer economically if his parents should be deported, it is not believed that as a matter of administrative discretion the respondents' applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon

> the accident of birth in the United States of their son would be to deprive others who are patiently awaiting visas under their already oversubscribed quotas."

He assigned no other reason whatsoever for the denial of suspension of deportation and failed to mention that such "accident of birth" made the child a citizen of the United States under the Constitution. His last quoted sentence is at utter variance with the true facts because, in enacting Subsection (c) of 8 U. S. C. 155, Congress very carefully provided that in cases wherein suspension of deportation was granted, the deportation proceedings should be cancelled, and that:

> "Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 212 of this title, for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: Provided, *that no quota shall be reduced by more than 50 per centum in any fiscal year.*" (Italics supplied)

It is commonly known that the small Greek quota long since was thus reduced to 50%, and will continue to be beyond the year 2,000, so that the granting of suspension of deportation to petitioners would not adversely affect anyone.

At the conclusion of said hearing, both appellants appealed to the Board of Immigration Appeals from said decision. The Board heard said appeals on January 23,

1953, and on March 18, 1954 made a decision denying suspension of deportation and dismissing the appeals, R. 11, 12, wherein it stated:

> "It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary and other evidence establish good moral character for the requisite period. The aliens have no connection with subversive groups." • • •
>
> "Notwthstanding the fact that • • • the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion. We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed."

The irony of the situation becomes apparent when it is noted that, in support of the proposition that the granting or withholding of the privilege of suspension of deportation is a matter of administrative discretion, the Board cites two cases, *Weddeke* v. *Watkins,* 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy,* 180 F. 2d 489. In each of these cases the manner in which the discretionary power was exercised was controlled by a fact inherent in the case and appearing in the record—Weddeke had been convicted of Incest upon an infant child, and Kaloudis had been a member of the International Workers Order, a red organization. In the instant case, as stated by both the Hearing Officer and the Board, the petitioners are and always have been persons of good moral character, and the record does not contain a single word of evidence to the contrary.

As neither the Hearing Officer's said decision nor the Board's said decision assigned any valid reason for same, and as they were totally unsupported by any evidence adduced at the hearing, a motion was made before the Board of Immigration Appeals to reopen and reconsider the matter, and on May 5, 1954 the Board made a decision, R. 14, 15, in which it stated:

> "Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. *It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted* (June 27, 1952). We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended." (Italics supplied).

Here, for the first time, the real reason for the Board's action appears. Instead of considering and deciding the case solely under the provisions of Section 19(c) of the Immigration Act of 1917, as amended, 8 U.S.C. 155(c), the Board erroneously based its decision upon what it believed was the intent of Congress in enacting the subsequent McCarran Immigration and Nationality Act of June 27, 1952 which, by the express provisions of its savings clause, Section 405(a), 8 U.S.C. 1101, note, provides that the provisions of the 1917 Act shall solely apply to applications for suspension of deportation pending prior to June 27, 1952, the date of its enactment.

ARGUMENT

POINT I

Petitioners have been denied due process of law, and the decision is not supported by the evidence.

On July 14, 1955, petitioners instituted the present habeas corpus proceeding, which the District Court below, Honorable Archie O. Dawson, U.S.D.J., dismissed on August 1, 1955 with an opinion, in which he stated, R. 4;

> "Prior to the final determination of this matter by the Board of Immigration Appeals, Congress had enacted the Immigration and Nationality Act, of 1952. Under the 1917 Act, as amended, the applicant for suspension of deportation had to show 'serious economic detriment.' Under the 1952 Act, the applicant would have to show that the deportation would 'result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child,' 8 U.S.C., Sec. 1254(a)(1).
>
> In the consideration of the 1952 Act in Congress, this change in the test to be applied to suspension of deportation was considered. The Senate Judiciary Committee, in its report on the Bill which subsequently became law, said:
>
> > 'The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation.' • • •
>
> The Attorney General, in exercising his discretion, could take into account the new standard which was

laid down by Congress. The new standard was referred to in the decision of the Board of Immigration Appeals of May 5, 1954."

This is error, especially in the light of the Saving Clause of the 1952 Act, Sec. 405(a); *supra*, which expressly provides that the 1917 Act shall control as to suspension cases pending at the time of the enactment of the 1952 Act, as was the instant case. In his dissenting opinion herein Judge Frank stated, R. 24:

> "Judge Dawson, in dismissing the habeas corpus writ recognized that the Board took 'into account the new standard which was laid down by Congress,' and held that the Board, in so doing, acted properly.
>
> Here the Board erred. The new statute narrowed the discretion of the Attorney General and thus of his delegate, the Board. Thus the Board did not feel free to exercise the discretion it had under the properly applicable legislation, i. e., the statute as it stood before the 1952 amendment. However, the new Act, as my colleagues concede, had no application to this case. Accordingly, it was precisely as if the Board, without relying on the amended Act, had declared that it would never grant discretionary relief unless deportation would 'result in exceptional and extremely unusual hardship to the alien, his spouse, parent or child.' Such a restriction by the Board of the breadth of its discretion was arbitrary and therefore illegal."

At the bottoms of pages 5 and 6 of his opinion, Judge Dawson quotes from a report made by the Senate Judiciary Committee prior to the enactment of said inapplicable 1952 Act, to support the foregoing erroneous conclusion. However, if it is at all necessary to examine the intent of Congress herein, it should be done with regard to that of the

76th Congress which enacted the Alien Registration Act of 1940, which amended said Section 19 of the Act of 1917 by adding thereto Subsection (c), the applicable provision of law in the instant case, as continued in force by said Section 405(a) of the McCarran Immigration and Nationality Act of June 27, 1952, 8 U.S.C. 1101 Note, *supra*.

House Report No. 2683 of the Conference Committee dated June 21, 1940 to accompany H. R. 5138, to amend Section 19 of the Act of February 5, 1917 by adding Subsections (c) and (d) thereto, states at page 9:

> "Subsection (c) provides that certain cases, generally those in which aliens are deportable solely because of illegal entry, the Attorney General may allow aliens to depart at their own expense, or may, subject to congressional review, *suspend orders of deportation where deportation would result in unwarranted hardship.*"

On the basis of that Conference Report the Senate and House enacted said amendment, and on June 28, 1940 the President approved same, which, insofar as relevant to the instant case, reads as follows:

> "(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien."

The very language indicates that its purpose was and is to protect the American citizen or legally resident alien

dependent on the deportable alien, and not such deportable alien. It remained unchanged during the ensuing 12 years until June 27, 1952, when the McCarran Act was enacted, and continued it in force as to cases pending on June 27, 1952, as was the case at bar.

That the Board of Immigration Appeals has so construed it is clear from its numerous decisions thereunder.

In *In re Emilio Consigliera*, A-2146468, decided by the Board on October 9, 1947, suspension of deportation had been denied by both the Hearing Officer and the Central Office because of certain acts on the part of the respondent, and in reversing the decision below the Board stated:

> "And in this connection we must remember that *we are not concerned with the respondent as an individual but as a head of an American family.*"

The case of *Mariangoula T. Tsolainos*, A-6250408, decided by the Board on November 25, 1949, is directly in point. That case involved a Greek citizen who was admitted as a visitor for six months. One month after her arrival she married a Greek citizen, then illegally in the United States. A male child was born of that union. The mother applied for suspension of deportation. The Central Office denied the application. The Board of Immigration Appeals reversed and granted suspension, adopting the view of counsel that:

> "As a matter of ordinary common sense, no one could possibly take the position that the loss of a two year old's mother would not be a serious detriment to the child because no amount of nurses, governesses and pediatricians could take the place in this or any child's life of the love and care of his mother. On the other hand, if the child were to be taken to Europe he would be forced to suffer the detriment of being brought up in a foreign land * * *.

This Board has given careful consideration to all the evidence of record, as well as all of the representations of counsel, and to the decision of the Assistant Commissioner of Immigration and Naturalization, and it is our conclusion that to enforce the departure of this appellant from the United States would in our opinion result in a serious economic detriment to this minor United States born child, particularly in the light of the condition of the quota of Greece, as well as the present chaotic conditions abroad, particularly in the country of the alien's nativity * * *."

On July 21, 1944, file 56111/780, the Board ruled to the effect that serious economic detriment exists if the effect of deportation of the applicant would be substantially to lower the standard of living of the dependent relative.

On May 15, 1943, file 56050/380, it ruled to the effect that when an alien has property worth $300 and takes care of her home and looks after the needs of her two American-born minor children, deportation would work serious economic detriment to the children, although the family receives $62.50 of public funds monthly for its maintenance.

On March 13, 1943, file 55834/444, it ruled to the effect that when an alien minor child is dependent on her United States citizen mother whose income is $30 per month, deportation of the child would result in serious economic detriment to the mother, for the mother then would be required to maintain two households from her income.

On March 30, 1943, file 56093/577, it ruled to the effect that the fact that an alien does not earn sufficient income to support his relatives, who must rely on public funds for the remainder of their maintenance, is not sufficient to

deny favorable consideration of his application for suspension of deportation, as to deport him would cause the loss of whatever income he does earn and increases the burden upon relief authorities.

On March 31, 1943, file 55930/335, it ruled to the effect that an alien woman who lives with and is completely occupied in the upbringing of her minor native-born citizen children, the family being supported by public relief funds in the absence of her husband, is performing services of economic value and her deportation would result in a serious economic detriment to her minor children.

In each of the above cases the aim was to avoid depriving the citizen dependent of the support of the deportable alien, no matter how meager the contribution might be. The citizen dependent's welfare, not that of the deportable alien, was and is the prime consideration, and each of said cases carried out the purpose and intent of the statute,

On December 24, 1952 his Honor, Judge Bondy, rendered an opinion in *Avgerinos* v. *Shaughnessy,* Civ. 79-104, in which he stated:

> "* * * The relator does not question his deportability. The sole question is whether suspension may be denied as a matter of discretion without disclosing the evidence on which the denial is based and without even disclosing the conclusion drawn from the undisclosed confidential information. * * *
>
> The District Court for the District of Columbia held in *Alexiou* v. *McGrath,* 101 F. Supp. 421 that although denial of relief is discretionary, nevertheless after the Attorney General had promulgated regulations establishing a procedure assuring a fair hearing on the issue of discretionary relief such procedure must be followed and that consideration of the confidential evidence without the disclosure thereof was error. See *U. S. ex rel. Salvetti* v. *Reimer,* 103

F. (2d) 777, 779; *U. S. ex rel. Weddecke* v. *Watkins*, 166 F. (2d) 369, 371; and the decision by this court in *U. S. ex rel. Bauer* v. *Shaughnessy*, Civ. 50-217 U.S.D.C., S.D.N.Y., July 28, 1949."

The petitioners herein are aliens who have entered the United States and they are entitled to due process of law, as was held by the Supreme Court in *Shaughnessy, District Director* v. *U. S. ex rel. Mezei*, 73 S. Ct. 625, in which, at page 629, it stated:

> "(3-6) It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. *The Japanese Immigrant Case* (*Karou Yanataya* v. *Fisher*), 1903, 189 U. S. 86, 100-101, 23 S. Ct. 611, 614, 47 L. Ed. 721; *Wong Yang Sung* v. *McGrath*, 1950, 339 U. S. 33, 49-50, 70 S. Ct. 445, 453-454, 94 L. Ed. 616; *Kwong Hai Chew* v. *Colding*, 1953, 344 U. S. 590, 598, 73 S. Ct. 472, 478."

In the *Avgerinos* case, *supra*, citing 17 Fed. Reg. 4740, 4741, Part 151, Judge Bondy defines "due process of law", as applicable to cases such as the instant one, in the following language:

> "The regulations in effect at the time of the Board's decision, and still in effect, provide that: the hearing officer may at such time, as he deems appropriate, advise the alien of his right to apply for discretionary relief, 151.2(c); the alien may at any time during the hearing under the warrant apply for one or more forms of discretionary relief from deportation, 151.3(e). The hearing officer shall present at the hearing 'all available evidence concerning factors bearing upon statutory eligibility for discretionary relief', 151.2(c) (4), and such other information as

may be pertinent to the issue of the case, 151.2(c) (5); the alien has a right to the presence of his counsel, and he or the counsel 'shall be permitted to offer evidence to meet any evidence adduced against the alien and to cross-examine witnesses.' 151.2(g); in addition he may submit any written or oral material which he believes should be considered in the exercise of discretion, 151.3(e); as soon as practicable after the hearing the hearing officer shall make 'a decision which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability; if the alien has applied for discretionary relief * * * the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such an application', 151.5(a); the decision shall be concluded with an order that the alien be deported, proceedings terminated or that discretionary relief be granted, 151.5(a)(c). Lastly, 151.2(b) expressly provides 'The hearing officer shall conduct a fair and impartial hearing.' (Part 151 as amended in 17 F. R. 4740, 4741.)

These regulations clearly establish that they were enacted in order to assure a fair hearing as a basis for the exercise of discretion conferred upon the Attorney General. The regulations have the force of law and must be followed. *Bilokumsky* v. *Tod*, 263 U. S. 149, 155; *Bridges* v. *Wilson*, 326 U. S. 135; 153. See *U. S. ex rel. Salvetti* v. *Reimer*, supra; *U. S. ex rel. Weddecke* v. *Watkins*, supra."

Most certainly the procedure in the case at bar does not meet requirements of the regulations so carefully enumerated in Judge Bondy's above quoted decision. The hearing officer and the Board both found that both petitioners were statutorily eligible for suspension of deporta-

tion, but, in denying same, failed utterly to assign any valid reason based upon the evidence adduced at the hearing, or otherwise, for such denial.

Therefore, petitioners were denied due process of law.

POINT II

The Attorney General's arbitrary exercise of discretion, or failure to exercise discretion under the applicable statute, is subject to judicial review.

Respondent, at page 2 of the brief in opposition to granting of certiorari herein, inadvertently quoted Section 19 (c) of the Immigration Act of 1917 as amended to 1940, but not as further amended by the Act of Dec. 8, 1942, c. 697, 56 Stat. 1044; and the Act of July 1, 1948, c. 783, 62 Stat. 1206; as set forth in 1951 Supp. to 8 U.S.C.A. (1942 Ed.), Sec. 155 (c).

At page 5 of said opposition brief respondent also quoted Section 244(a)(5) of the Immigration and Nationality Act of June 27, 1952, which has absolutely no bearing on the issues herein because the suspension applications herein were pending prior to such enactment, and the Savings Clause of said 1952 Act, Sec. 405(a), *supra*, expressly provides that as to all such applications the 1917 Act, as amended, is "hereby continued in force and effect."

At page 13 of said opposition brief respondent quoted from this Court's recent decision in *Jay* v. *Boyd*, 76 S. Ct. 919, 925, as follows:

> "* * * However, Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General. The statute says that, as to qualified deportable aliens, the Attorney

General 'may, in his discretion' suspend deportation. It does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised."

Here the Court was discussing the 1952 Act, and not the 1917 Act, as amended, which solely applies to the case at bar and does not contain the words "in his discretion." In footnote 15 to said opinion this Court states:

"15. Congress first provided for suspension of deportation in 1940 by adding a new provision to the Immigration Act of 1917. 54 Stat. 672, as amended, 62 Stat. 1206, 8 U.S.C. (1946 ed., Supp. V) Sec. 155(c). That new provision provided that 'the Attorney General may • • • suspend deportation' under certain circumstances. In enacting the Immigration and Nationality Act of 1952, Congress added the phrase 'in his discretion' after the words 'the Attorney General may.' In an analysis of draft legislation leading up to the 1952 Act, prepared by the Immigration and Naturalization Service for the assistance of the congressional committees, it was stated that the new words were suggested 'in order to indicate clearly that the grant of suspension is entirely discretionary • • •.' That analysis was considered by the congressional committees. See S. Rep. No. 1137, 82d Cong., 2d Sess., p. 3; H. R. Rep. No. 1365, 82d Cong., 2d Sess., p. 28."

Further, under the 1917 Act the beneficiaries of the relief are the "citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien" who would suffer serious economic detriment by his deportation, a class of persons entitled to the utmost consideration under the law, and no mention is made of benefit to the deportable alien; whereas, under the 1952 Act the benefit accrues

to "*the* (*deportable*) *alien* or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence," and, accordingly, Congress broadened the power of the Attorney General by including in the 1952 provision the words "in his discretion." In other words, under the 1917 statute the word "may" is almost interchangeable with "shall" if the eligibility tests of that statute are met, whereas in the 1952 statute Congress deliberately removed any question by including the phrase "in his discretion." However, the 1952 Act most certainly did not enlarge the Attorney General's discretionary power to the extent that he could apply the narrower restrictions of that Act to cases pending on June 27, 1952, which its Savings Clause, Sec. 405(a), expressly provided should be subject solely to the broader provisions of Sec. 19 (c) of the 1917 Act, and regulations lawfully made thereunder, 17 Fed. Reg. 4740, 4741, Part 151.

At page 13 respondent's said opposition brief quotes further from *Jay* v. *Boyd, supra,* as follows:

> "Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. Accardi v. Shaughnessy, 347 U. S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace,' Escoe v. Zerbst, 295 U. S. 490, 492, and 'cannot be demanded as a right,' Berman v. United States, 302 U. S. 211, 213. And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole." (Emphasis added.)

However, the word "unfettered" is probably used in its broadest sense, because every administrative official is bound by the limitations of the statutes under which he

claims jurisdiction in particular instances, and, even as to the federal parole board, in *McNally* v. *Hill*, Warden, 55 S. Ct. 24, 28, this Court said:

> "(8) The petitioner asks here only a ruling which will establish his eligibility for parole, because of the invalidity of the sentence on the third count. *The ruling sought is such as might be obtained in a proceeding brought to mandamus the parole board to entertain his petition for parole, if the sentence on the third count were void for want of jurisdiction of the court to pronounce it.* This use of habeas corpus is unauthorized by the statutes of the United States, and for that reason the judgment must be affirmed." (Our italics.)

In the return to the writ of habeas corpus herein, respondent stated in paragraph 15:

> "The denial by the Board of Immigration Appeals of the discretionary privilege of suspension of deportation, in the circumstances of these cases, is not subject to judicial review. (See *Kaloudis* v. *Shaughnessy*, 180 F. 2nd 489). The granting of a joint executive and legislative 'pardon' from deportation is a matter of grace and is a discretionary matter wherein the courts may not intervene." (See also: *U. S. ex rel. Bartsch* v. *District Director*, 175 F. 2d 245; *U. S. ex rel. Ciannamea* v. *Neely*, 202 F. 2d 289; *U. S. ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371; *U. S. ex rel. James* v. *Shaughnessy*, 202 F. 2d 519; *cert. denied* 345 U. S. 969; *U. S. ex rel. Matranga* v. *Mackay*, 210 F. 2d 160, cert. denied 347 U. S. 967.)

However, an examination of the cited cases and other cases will show that in every one of them there was evidence adduced at the hearings which fully justified the manner in which the discretionary power was exercised against the alien's contention, for instance, in the *Weddeke* and

Kaloudis cases, *supra*, the former had been convicted of incest upon a child, and the latter had been a member of a subversive organization. In *Jay v. Boyd*, *supra*, Jay likewise had been a member of a subversive organization, and the main question before this Court was the propriety of the consideration by the Board of Immigration Appeals of confidential information undisclosed to petitioner for reasons of national security. No such evidence was adduced in the immigration proceedings in the case at bar.

Further, in 1950 the Court below held in *Mastrapasqua* v. *Shaughnessy*, C.A.N.Y. 1950, 180 F. 2d 999, that where Board of Immigration Appeals refused to exercise general discretionary power to grant deportable aliens a pre-examination as to right of re-entry or suspension of deportation, on sole ground that Italian applicant was an alien whose presence within the United States was due solely to World War II, and that the Attorney General had decided without explanation that no discretionary relief should be accorded such persons, classification was capricious, and alien was entitled to release in habeas corpus proceeding unless within reasonable time set by the District Court discretion was exercised.

In 1953 the United States District Court for the District of Columbia, in *U. S. ex rel. Athanasopoulos* v. *Reid*, 110 F. Supp. 200, held that although Attorney General was vested with sole discretion to permit voluntary departure of aliens in lieu of deportation in situations specified by former Section 155 of Title 8, omissions from record and exclusion by hearing officer of competent evidence constituted an infringement of law in that reviewing authority had no basis upon which to exercise discretion.

The two last cited decisions are in accord with a long line of decisions running back through the last century, and they, together with Judge Bondy's said decision of December 24, 1952, Civil 79-104, in *Avgerinos* v. *Shaugh-*

nessy, supra, and that of the District Court for the District of Columbia in *Alexiou* v. *McGrath,* 101 F. Supp. 421 (1951), *supra,* completely nullify the above-quoted contention of the respondent herein.

In the instant case there has been a total failure to properly exercise discretion, and no evidence was adduced at the immigration hearing to support the erroneous decision herein.

CONCLUSION

It is respectfully submitted that the decision below should be reversed, and, in accordance with *McGrath* v. *Kristensen,* 340 U. S. 162, at 170, 171, the case should be remanded to the immigration authorities for a redetermination of petitioners' eligibility for relief, with instructions as to the correct interpretation of Section 19(c) of the Immigration Act of 1917, as amended, 8 U.S.C.A. 155(c), *supra.*

Respectfully submitted,

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